

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

74-2522

To be argued by

RAYMOND BERNHARD GRUNEWALD

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2522

UNITED STATES OF AMERICA,

Appellant,

—against—

IRVING STERN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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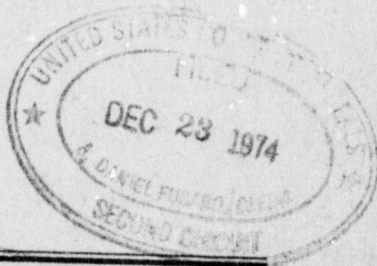
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2

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Question Presented	3
Statement of Facts	3
A. The Suppression Hearing	3
B. The Tape Transcript	9
C. The District Court Findings and Ruling ..	11
ARGUMENT	
POINT I—Statements, made in confidence by a person to an attorney in the course of private consultations with him as an attorney, and which were, unknown to the client, surreptitiously tape-recorded, in part, by the attorney, are privileged and, absent proof of explicit consent to reveal by the client, are not subject to disclosure and their employment, and leads obtained from them, must be suppressed	14
POINT II—The District Court held that the conversations were privileged, not just because of client-principal and attorney-agent communications, but because there was an attorney-client relationship	21
POINT III—The evidence does not support appellant's claim that appellee sought professional assistance to perpetrate a fraud	25
CONCLUSION	27

TABLE OF AUTHORITIES

Cases

	PAGE
<i>Alexander v. United States</i> , 138 U.S. 353 (1891) ..	17, 18
<i>Andrews v. Simms</i> , 33 Arkansas 771	17
<i>Bacon v. Frisbie</i> , 80 N.Y. 394	17
<i>Baird v. Koerner</i> , 279 F.2d 623 (9th Cir. 1960) ..	17-18
<i>Britton v. Lorenz</i> , 45 N.Y. 51	17
<i>Chirac v. Reinicker</i> , 11 Wheat., 280 (1826)	17
<i>Clark v. United States</i> , 289 U.S. 1, 53 S.Ct. 465 (1933)	26
<i>Comercio E. Industria Continental, S.A. v. Dresser Industries</i> , 19 F.R.D. 513 (S.D.N.Y. 1956)	19
<i>Continental Oil Co. v. United States</i> , 330 F.2d 347 (9th Cir. 1964)	20
<i>Glasser v. United States</i> , 315 U.S. 60 (1943)	14, 20, 21
<i>Hunt v. Blackburn</i> , 128 U.S. 464 (1888)	16
<i>Hunydee v. United States</i> , 355 F.2d 183 (9th Cir. 1965)	20, 24
<i>In re Bonnano</i> , 344 F.2d 830 (2d Cir. 1965)	19
<i>Prichard v. United States</i> , 181 F.2d 326 (6th Cir. 1950)	23
<i>Robinson v. United States</i> , 144 F.2d 392 (6th Cir. 1944), <i>cert. denied</i> , 323 U.S. 789 (1944), <i>aff'd. on other grounds</i> , 324 U.S. 282 (1945), <i>reh. denied</i> , 324 U.S. 889 (1945), <i>reh. denied</i> , 325 U.S. 895 (1945), <i>motion for leave to file pet. for reh. de- nied</i> , 326 U.S. 807 (1945)	18
<i>Smale v. United States</i> , 3 F.2d 101 (7th Cir. 1924)	23
<i>United States v. Costen</i> , 28 F.2d (C.C.D. Colo. 1889)	18

	PAGE
<i>United States v. Kovel</i> , 296 F.2d 918 (2d Cir. 1961)	19, 20, 24
<i>United States v. Lockett</i> , 484 F.2d 89 (9th Cir. 1973)	14
<i>United States v. United Shoe Machinery Corp.</i> , 89 F.Supp. 357 (D.C. Mass. 1956)	20
<i>Watkins v. United States</i> , 354 U.S. 178 (1957)	8
<i>Williams v. Fitch</i> , 18 N.Y. 546	17

Statutes

18 United States Code	
§ 1962(c)	1
§ 1962(d)	1
§ 3731	2
26 United States Code	
§ 7201	1
§ 7206(1)	1
29 United States Code	
§ 186(a)	1
§ 186(b)	1

OTHER AUTHORITIES

8 Wigmore, <i>Evidence</i> (McNaughton Rev. 1961), § 2292	19
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UNITED STATES OF AMERICA,

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—against—

IRVING STERN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

Preliminary Statement

On March 21, 1974, appellee and other officers of Local 342, Amalgamated Butcher Workmen of North America, were indicted in the Southern District of New York, pursuant to indictment 74 CR 287,¹ and were charged with violations of §§ 1962(c) and 1962(d), Title 18, U.S.C., §§ 186(a) and 186(b), Title 29, U.S.C. and §§ 7201 and 7206(1), Title 26, U.S.C.

As a result of discovery motions appellee listened to a tape recording and received a transcript of an unauthorized

¹ As a result of defense motions, attacking substantial portions of indictment 74 CR 287 as defective, on November 7, 1974, the government procured an additional indictment, 74 CR 1049, and moved its consolidation with the initial charges and for dismissal, at trial time, of certain counts in the original indictment.

taping of conversations he had held with an attorney while consulting with the latter. On August 26, 1974, appellee moved to suppress for use as evidence upon the trial of the indictment, anything and everything evidentiary obtained from or through the appellee, Irving Stern, as well as any leads obtained therefrom, as a result of any conversation between Irving Stern and any attorney at law, and, in particular, one Walter H. Bodenstein, Esq., on the grounds that such conversation was privileged, that the unauthorized revelation of such conversation and the information contained in it was in violation of the recognized protections afforded persons in an attorney-client relationship, and that its acquisition and projected use were in derogation and contravention of appellee's rights under the Fourth, Fifth and Sixth Amendments to the United States Constitution.

At the government's suggestion, the motion was deferred to a time immediately preceding the trial of the issues. A hearing was held by United States District Judge Thomas P. Griesa on November 18 and 19, 1974. On November 19, 1974, the District Court rendered its decision and granted appellee's motion to suppress, in substantial part, as to the trial utilization of the unauthorized tape recording and similar privileged communication on other occasions between appellee and attorney Walter H. Bodenstein.

On November 21, 1974 the government filed a notice of appeal pursuant to § 3731, Title 18, U.S.C., from the decision of the United States District Court, Southern District of New York, and on November 22, 1974, obtained a stay of the trial pending determination of its appeal.

Question Presented

Did the District Court abuse its discretion, after examining the recorded communication and hearing the testimony of the participants, in upholding appellee's claim of attorney-client privileged communication and granting suppression of the utilization of such privileged communications at the trial?

Statement of Facts

Pursuant to motion for discovery, appellee received a written transcript from government counsel which reflected that appellee Irving Stern's conversation on May 18, 1973 with a New York attorney, one Walter H. Bodenstein, Esq. unbeknownst to appellee, had been surreptitiously tape-recorded by the attorney and subsequently turned over to government agents. Irving Stern asserted that his attorney-client privilege had been violated and moved for suppression of the use of the tape, the statements contained therein, any other privileged conversations, and the leads obtained therefrom. (A. 1-6)²

A. The Suppression Hearing

On November 18th and 19th, 1974, appellee's motion to suppress was heard before United States District Judge Thomas P. Griesa. Irving Stern called attorney Bodenstein to testify. (HR. 25)

Walter Bodenstein has been admitted to the bar of the State of New York for fourteen (14) years. He maintained and still maintains offices in New York County for the practice of law. (HR. 25-27) In March 1973 he had been indicted on corporation income tax charges in the United

² Reference Key: TR.—Tape transcript record; HR.—Hearing record; A.—Appellee's appendix.

States District Court, Southern District of New York, together with his father-in-law, one Moe Steinman,³ and an uncle. The indictment, although still pending, is to be nolle prosequi pursuant to a letter agreement dated August 14, 1973 between Bodenstein's counsel, Steinman's counsel, other counsel and the same attorney for the government prosecuting appellee's case. (HR. 28-36) Although Bodenstein professed, in essence, that his turning over of the tape to government agents was unrelated and a voluntary act on his part,⁴ remarkably enough the tape recording was at the suggestion of counsel for his father-in-law⁵ and the agreement to nolle prosequi the indictment was negotiated and agreed to by the same attorney, together with co-counsel, and only then was the tape turned over. Bodenstein never consulted with any Ethics Committee as to the propriety of his acts.⁶ (HR. 27-31; HR. 33-37; HR. 48-49; HR. 95; HR. 99-101; HR. 136-137) When the tape recording was made, and conversations held, no one was present but appellee and Bodenstein. Appellee did not know that the conversation was being recorded and never authorized it. (HR. 31-32; HR. 44-45)

³ Moe Steinman was, until recently, the Labor Relations Director for the Daitch-Shopwell supermarket chain. Stern knew him for many years. (HR. 161-162)

⁴ When asked by government counsel if *he* disclosed to the government the existence of the tape prior to the August 14, 1973 nolle prosequi agreement, Bodenstein's answer was "I *think* not." In any event *delivery* was after the event. (HR. 90)

⁵ The government, at p. 5 of its brief, asserts that Bodenstein did this "upon the advice of *his* lawyer." The record says otherwise. (HR. 95)

⁶ The type of conduct indulged in by attorney Bodenstein would appear to be subject to disciplinary action. See, New York Law Journal, p. 1, November 29, 1974.

Bodenstein had (as reflected in the tape transcript) an unrecorded conversation with appellee approximately one week to ten (10) days prior to the taped conversation of May 18, 1973. Stern had given him financial data as to Stern's past financial dealings and requested Bodenstein's assistance. At no time did Bodenstein ever state to Stern that appellee's discussions did not come within the attorney-client privilege or that he would reveal it to others. In his questioning of Stern, Bodenstein followed the same legal interrogation practices that a general law practitioner utilizes in securing information to turn over to a legal specialist or to determine what legal specialist to use.⁷ Bodenstein sought to draw out, on May 18, 1973, the same information that Stern had imparted the previous week. Bodenstein, confronted with the tape transcript, admittedly gave Stern advice as to securing a tax lawyer but denied he did so the previous week. (HR. 46-48; HR. 50-54; HR. 79; HR. 58-59)

Bodenstein understood that Stern was seeking to obtain additional counsel. (HR. 63) He knew, from prior discussion with appellee, that Stern had "a tax problem that he did not know how to handle." (HR. 65) Bodenstein was not engaged in attempting to aid and assist in the commission of any crime during the course of their conversation. (HR. 69) He was arranging for Stern to discuss appellee's tax problem with Mr. Bender, an acknowledged tax law specialist. The problem discussed, both on May 18, 1973, and prior thereto, dealt with the utilization of certain bonds by appellee as collateral. He knew Stern was concerned about the implications of such bonds from a tax

⁷ The Trial Court stated that this type of information was "privileged on its face." (HR. 51; HR. 266-267) In fact Bodenstein, in relation to his own income tax problems, utilized the same method with regard to himself in securing a tax expert! (HR. 140-142)

point of view. Stern had given him a great many factual particulars in confidential discussions preceding the May 18, 1973 taped discussion. (HR. 70-73; HR. 76-80)

On cross-examination Bodenstein stated he never *represented* appellee in any legal proceedings. Nor did he receive a fee. He denied that he acted as lawyer with Stern as a client. On redirect, he admitted that he had had clients come to him without a fee and whom he ultimately didn't represent. (HR 136)

The Trial Court elicited the acknowledgment from Bodenstein that at least part of Bodenstein's ostensible purpose in discussions with Stern was to help find a solution to Stern's problems that had been talked about on earlier occasions and that it was from a *legal standpoint*. Part of this was for Bodenstein to help in arranging for an appointment with specialist counsel. Bodenstein described Stern as a man who was highly upset, agitated, had lost his composure and was distraught by the precarious state of his wife's health. (HR. 116-117; HR. 119) Bodstein suggested that Stern was irrational at this time.⁸ (HR. 127)

Irving Stern testified in his own behalf. Director of Organization for Local 342, Amalgamated Meat Cutters and Butcher Workmen of North America, and a vice-president of the International, over a period of some seventeen to eighteen years, he had met and dealt with attorneys. Although he solicited their legal advice, he did not always pay a fee. But one thing he knew and relied on: that seeking advice from and consulting with an attorney about personal legal problems was confidential and privileged. Just prior to conversing with attorney Bodenstein in April and May

⁸ Stern was under medication (Vallium, a tranquilizer) and it obviously impaired his mental faculties. (HR. 258-259)

of 1973, Stern had been particularly advised, by another lawyer, about discussing his personal legal problems only with attorneys because of the client-lawyer relationship, confidentiality and ensuing privilege. (HR. 148-151)

Stern stated that Walter Bodenstein had contacted him around July 1972 with respect to an investigation in the meat industry and was told that appellee's name had been mentioned. As rumor persisted, Stern kept in touch with Bodenstein. Stern had previous contacts with Bodenstein with respect to legal matters when Bodenstein represented others. (HR. 152-154; HR. 156-158)

Stern solicited Bodenstein's advice, as an attorney, with respect to past financial dealings in stock transactions. Prior to May 18, 1973, Bodenstein had repetitively assured him that since Stern came to him as an attorney for legal advice, his confidences were protected. Appellee was gravely concerned about his reputation, fearing any implication of wrongdoing, and wanted absolute confidentiality. When Stern received a notice from the Internal Revenue Service in March 1973 he became extremely upset. He, thereafter, consulted with several lawyers including Walter Bodenstein. He offered to pay Bodenstein a fee but was told it wasn't necessary.⁹ Stern felt Bodenstein was knowledgeable with respect to tax difficulties and especially since Bodenstein had experienced such problems personally. Bodenstein had opined, on an earlier occasion, that *perhaps* he might not be able to actually represent Stern, but perhaps he would secure other counsel. On a particular New York State investigation matter, involving representation before a Grand Jury, Bodenstein declined "representing" Stern

⁹ Stern's assertion of fee offers, stated in his moving papers and at the hearing, *were never contradicted*. The government chose to stress only that a fee was not paid. The Trial Court noted its lack of relevance. (HR. 218; A. 8)

because he felt it was improper.¹⁰ (HR. 161-163; HR. 167-172; HR. 179-180; HR. 203; HR. 208-211; HR. 227-228)

On the occasion prior to the tape recorded conversation of May 18, 1973, appellee had come to Bodenstein to seek legal advice on what Stern conceived to be a serious tax problem involving his past personal finances. Bodenstein obtained the particulars and advised appellee with respect

¹⁰ This involved the so-called "Iowa Beef" case in which Bodenstein's father-in-law, Moe Steinman, together with the Iowa Beef Processors Corporation, Currier Holman, co-chairman of the Board of Directors, and C.P. Sales, Inc., a corporation in which Bodenstein had substantial interests. Interestingly enough, Steinman has publicly admitted, in open court, that he never intended to bribe union officials in that case and actually he just was pocketing the money. Appellee Stern was not indicted in that case or its companion case, *United States v. Holman, Steinman, et al.*, 73 CR 215 (S.D.N.Y.) which will be nolle prosequi pursuant to arrangement made with government counsel, Steinman, Bodenstein and their counsel. In an obtuse fashion the government notes, in a footnote, at p. 32 of its brief, that the alleged payments that "Stern is charged with having received from Steinman have nothing to do with IBP." But Appellant's brief, in its Statement of Facts, at pp. 8-9 therein, makes the assertion that appellee Stern, "... after being advised that the investigation related to Moe Steinman, ... refused to testify" There is nothing in the record to support this statement. The reason appellee didn't testify was because the Assistant District Attorney wouldn't give the scope or "parameters" of the inquiry and, upon advice of counsel, he properly exercised his rights. Cf., *Watkins v. United States*, 354 U.S. 178 (1957). Stern wanted to testify (HR. 166-167) As noted above, appellee Stern was not indicted.

In a footnote, at p. 8 of its Statement of Facts, the government volunteers that Stern was "unable to explain why he would ask Bodenstein to represent him in connection with an investigation relating to IBP when he thought Bodenstein was IBP's lawyer." The reference to the transcript does not support this assumption at all. Stern was never permitted to fully answer questions thrust at him. He never stated he was unable to explain, assuming, *arguendo*, it is his obligation to do so.

to securing further particulars.¹¹ The need for additional and specialist counsel was discussed. Bodenstein assured Stern that their conversation was confidential. Whenever any third party appeared the discussion would cease. The transcript of May 18, 1973 reflected a portion of the factual information furnished prior thereto. Stern sought Bodenstein's assistance in obtaining special counsel in tax matters and gave him the necessary background information. (HR. 192-196; HR. 198; HR. 199-202; HR. 228; HR. 260)

Bodenstein actually did arrange an appointment between appellee and tax specialist Louis Bender. Stern consulted with Bender about his anticipated legal difficulties from a tax and otherwise related viewpoint. (HR. 247-251)

B. The Tape Transcript

Analysis of the transcript of the taped conversation (excluding the vulgarities of speech and other similar banalities) of May 18, 1973, reveals an initial conversation by attorney Bodenstein, acknowledging a prior discussion with appellee on the week previous; Bodenstein's comments on

¹¹ In its Statement of Facts, at p. 4 therein, the government blandly asserts "At one of these meeting at Bodenstein's office in early May, 1973, Stern expressed concern about an Internal Revenue Service audit he was the subject of, *adding that he was afraid that his unexplained ownership of certain bonds worth \$110,000 . . .*" [Emphasis supplied] might make it appear that he got it from IBP. There is nothing in the transcript to reflect this "ownership" assertion. Stern testified that he was concerned about his having the the use of bonds as *collateral* for loans used in stock transactions. (HR. 192; HR. 200; HR. 248) Stern had stated that he had *borrowed* the bonds to use as collateral. (HR. 252-253; HR. 255-256).

A claim of "contradiction" in testimony is made, at p. 9 of the government's Statement of Facts, with respect to a question as to whether or not Stern had spoken to attorney Bodenstein prior to retaining another lawyer to formally appear with respect to the tax audit notice. However, Stern explained what happened. He had called Bodenstein first, to see who *he* would recommend and to check out other counsel. (HR. 207-217)

and concerns about "Iowa Beef", and appellee's generally brief responses (TR. 2-3; A. 13-14), immediately followed up by attorney Bodenstein eliciting factual financial data concerning bonds from appellee Stern and Stern's comments on records and the like. Attorney Bodenstein then advises "... what we've got to do. You've got an exposure with these ... things ..." and "... let me tell you what I think ought to be done as a first step." (TR. 3-5; A. 13-18) Then there is a discussion as to where should Stern go for top flight income tax advice from outstanding tax specialists at the bar, such as Kostelanetz and Bender. Attorney Bodenstein, having secured background factual details, then undertakes to set up an appointment with a leading tax specialist, Lou Bender, as Stern expresses great fear that moneys will be *falsely* ascribed to him as products of illegal dealings. (TR. 6-8; A. 18-22) Bodenstein offers to assist by posing the problem without even mentioning appellee's name. He assures Stern that he knows the situation totally since Stern has given him the necessary facts and he will relay the factual situation to the tax law expert. (TR. 9; A. 23-24)

Stern, a shaken man, repetitively expresses his fear of false accusation of hidden money and his fear of being unable to satisfactorily explain his financial dealings. He spoke of what he thought someone might suggest to him as an explanation but, as Stern stated "... I don't know. I don't know. There's got to be an answer. I just can't have a no answer." As he did so, attorney Bodenstein reassured him that he would solicit the best tax counsel advice. (TR. 10-12; A. 26-29) As Stern phrased it to attorney Bodenstein ... "I'm turning ... in desperation for some advice of, cause I'm much afraid of talking and much afraid. *The only one I really consulted, that knows the whole god-damned thing, you know, is you.*" A few sentences earlier,

attorney Bodenstein had stated: "... I think I know the answer *as a lawyer*," to which Stern then responded, "*As an attorney* you know the answer." (TR. 12; A. 29)

C. The District Court Findings and Ruling

On November 19, 1974, the United States District Court found that an attorney-client privilege did exist with respect to Stern's conversations with attorney Bodenstein and ruled that the appellee's motion to suppress was granted as to all parts of the tape and transcript, starting from discussions as to bonds on page (3) of the transcript. (HR. 261-267; HR. 307-311) Furthermore, any similar Stern-Bodenstein discussions, *i.e.*, financial transactions, would have a similar ruling, and any attempt at offering evidence of the same would require an appropriate ruling. (HR. 271)

In arriving at its conclusion, the Court initially made a series of observations:

(1) That the relationship between attorney Bodenstein and Stern originated in other than an attorney-client relationship and that the relationship (even as of May 18, 1973) *may* have had several aspects, which could be delineated. (HR. 261)

(2) That Stern did go to attorney Bodenstein to further consult with a reputable criminal tax attorney. (HR. 261)

(3) That the fact was that, in seeking advice as to where to go for specialized tax advice, Stern did utilize an attorney, Bodenstein. (HR. 261)

(4) That the information given to Bodenstein as an attorney or as an attorney-agent for the purposes of conveying it to a specialist attorney was protected by the attorney-client privilege. (HR. 262-263)

(5) That a person can seek legal advice from a lawyer without any clear idea of what the lawyer can do for him and success is not the criteria on the issue of privilege. (HR. 264)

(6) Desire of the client to remain anonymous to the specialist attorney doesn't destroy the privilege. (HR. 264)

(7) Possible thoughts by the client about possible fabrication doesn't destroy the privilege. (HR. 264-265)

(8) Attorney Bodenstein's eliciting of facts from appellee Stern was lawyer-like and Stern gave the information for the purpose of securing legal advice. (HR. 267)

Thereafter, the Court engaged in questioning government counsel respecting various suppositions of fact, *i.e.*, ". . . *suppose* that Mr. Bodenstein was not being sought as an attorney as such, but . . . as a channel of communications on Mr. Stern's behalf to Mr. Bender . . ." as an agent. "Suppose I am consulting with an attorney . . . [and] . . . I have my secretary there . . . taking notes . . ." (HR. 278-286). The government conceded that despite Mr. Stern having retained counsel, other than Bodenstein, that this would not vitiate any claim of privilege with respect to attorney Bender. (HR. 286-288)

After listening to the government's contention that even if there was an attorney-client relationship, it was dissipated because the advice sought was advice designed to aid or assist in the perpetration of a criminal act or a fraud, the District Court found nothing in the record to support such a claim, asserted that the government's argument was based on misquoting and misconception of the provable facts and stated that the facts fell substantially short of

showing fraud and misuse of otherwise privileged communications.¹² (HR. 290-297)

Thus, after listening to the witnesses, government counsel's arguments, posing numerous hypothetical questions, weighing the facts, credibility, Stern's testimony *vis a vis* Bodenstein, (HR. 306-310) the District Court further amplified and stated:

"Therefore, I would hold . . . the weight of the evidence is that in this conversation Mr. Stern was speaking to Mr. Bodenstein *as an attorney* . . ."

". . . it does seem to me clear that Mr. Bodenstein was more than merely an intermediary. The confidences would not have been given to him, it seems to me, without the belief on the part of Mr. Stern that he was giving them to someone who could have the judgments that are associated with attorneys." (HR. 310-311)

¹² At p. 30 of its Statement of Facts, the government states that the District Court gave, as one of the "bases for its decision":

"(3) That even if Stern's purpose in consulting with Bodenstein and Mr. Bender were to come upon a fabricated explanation for the bonds, that purpose would not destroy the privilege (TR. 264-265, 294-297). In any event, Judge Griesa was not satisfied that it was certain that this was Stern's purpose (Tr. 264-265, 294-297)."

This is distortion of the Court's analysis and is not supported by the record.

POINT I

Statements, made in confidence by a person to an attorney in the course of private consultations with him as an attorney, and which were, unknown to the client, surreptitiously tape-recorded, in part, by the attorney, are privileged and, absent proof of explicit consent to reveal by the client, are not subject to disclosure and their employment, and leads obtained from them, must be suppressed.

At the outset the appellee is constrained to address himself to appellant's overall approach to the known facts as proved. From the flavor of its brief, the government appears to be asking that the question of privilege be decided *de novo* in the instant case. In so doing, it effectively overlooks that the trial court held a two day evidentiary hearing at which the participants in the conversations were examined at great length by counsel for both sides and by the court itself, eliciting conflicting views of the communications involved. More importantly, the government studiously ignores the self-evident proposition that the trial court, on all the evidence, found the relationship to be privileged. The government, here as appellant, appears to be more accustomed to appearing as an appellee entitled to have the evidence and inferences therefrom viewed in a light most favorable to it. See, *Glasser v. United States*, 315 U.S. 60, 80 (1943). Nonetheless, such is not this case and the government's attempt to so argue should not be excused. The District Court's fact finding in Stern's favor should not be disturbed unless demonstrated to be "clearly erroneous", a contention which the government does not argue. See, e.g., *United States v. Luckett*, 484 F.2d 89, 90 n.1 (9th Cir. 1973) (*per curiam*).

The simple facts are that Irving Stern, a layman, under medication, and in a state of intense personal turmoil, went to Walter Bodenstein, an attorney known to Stern as such, and consulted with him in confidence about anticipated legal problems. He had consulted with him in the past without a fee payment. The May 18, 1973 conversation, secretly recorded by Bodenstein, itself reveals Bodenstein referring to his role as a "lawyer" (TR. 12; A. 29) and Stern confirming "As an attorney you know the answer" (*Id.*). Although Stern had another lawyer starting to represent him formally with the Internal Revenue Service, he expressed to Bodenstein, "The only one I really consulted, that knows the whole goddamned thing, you know, is you". The upshot of the meeting of course was the arrangement of an appointment with a reputable tax specialist. The District Court on these facts, properly concluded that Stern's purpose was to confide in an attorney-client relationship.

To overcome the District Court holding, appellant points to the fact that Stern had another lawyer at the time of the May 18 meeting. But the District Court correctly noted that Stern remained free to seek further counsel. Stern testified that he secured present counsel in a rush because of his belief that he must respond almost immediately to the IRS notice. (HR. 166; 210) Experience dictates that it is quite common for persons represented by an attorney of record to consult with others and even to "shop around" for other lawyers. Apprehension and nervousness are often the cause and it certainly can be said that appellee Stern was under great emotional strain at this time in his life. (HR. 116-117; HR. 119; HR. 127; HR. 163-164; HR. 258-259)

The government seeks to make much of the fact that on the occasion of two matters Bodenstein said he would be unable to "represent" Stern. It neglects recognition of the

fact that at no point did Bodenstein ever tell Stern he would not "counsel" Stern as an attorney. Moreover, it neglects Stern's testimony—which must be taken as true in this proceeding—that in communicating with Bodenstein it was explicitly understood that the relationship was attorney-client privileged. (HR. 161-162; HR. 197-198) Bodenstein never advised Stern that he could not consult with him in reliance on the privilege.

Finally, the appellant insists that because Stern's purposes in meeting with Bodenstein may have been several, the privilege is destroyed. Without conceding that Stern was not entitled to consult with a lawyer about a pending investigation and incident to it receive information from the lawyer, all of which would fall within the overall protection of this privilege, it is sufficient to note that the District Court has already dealt with government's contention and delineated the portion of the transcript which is clearly privileged under any view of Stern's purposes.

In *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the United States Supreme Court plainly stated:

"The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure. *But the privilege is that of the client alone. . . .*" [Emphasis supplied]

Thus only the client can waive the privilege, not the attorney. The latter occupies the position of the priest to the penitent. In our society it has always been so and for reasons that are self-obvious.

There is no formal language of retainer required to establish an attorney-client relationship. A person who comes to an attorney, whom he knows to be an attorney, and to whom he reveals confidential matters that had occurred previously and about which he was concerned, has the absolute right to rely on an attorney-client relationship. *Alexander v. United States*, 138 U.S. 353 (1891). As the United States Supreme Court phrased it, *id* at 358, in reversing a murder conviction because of the admission into evidence of factual data related by a defendant to an attorney, apparently prior to formal charges and without payment of a fee:

"If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, *neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege.* *Williams v. Fitch*, 18 N.Y. 546; *Britton v. Lorenz*, 45 N.Y. 51; *Bacon v. Frisbie*, 80 N.Y. 394; *Andrews v. Simms*, 33 Arkansas, 771. [Emphasis supplied]

"In the language of Mr. Justice Story, speaking for this court in *Chirac v. Reinicker*, 11 Wheat, 280, 294: 'Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent.' "

Confidential communications between client and attorney were privileged under common law; the rule is of ancient origin. *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). As stated by the Court in *Baird*, at 629, 635:

"... The doctrine is based on public policy. While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer."

* * * * *

"As has been said,

[I]t is the glory of our profession that its fidelity to its client can be depended on; that a man may safely go to a lawyer and converse with him upon his rights or supposed rights in any litigation with the absolute assurance that that lawyer's tongue is tied from ever disclosing it * * * *United States v. Costen*, C.C.D. Colo. 1889, 28 F.2d 24 (opinion by Mr. Justice Brewer, then Circuit Judge)."

The fact that there were other attorneys representing the client, at the time he consulted with other counsel, is inconsequential and immaterial. *Baird v. Koerner*, *id* at 635. And it is beside the point that the attorney did not receive a fee or accept a retainer. *Alexander v. United States*, *Ibid*; *Robinson v. United States*, 144 F.2d 392, 405 (6th Cir. 1944), *cert. denied*, 323 U.S. 789 (1944), *aff'd. on other grounds*, 324 U.S. 282 (1945), *reh. denied*, 324 U.S. 889 (1945), *reh. denied*, 325 U.S. 895 (1945), *motion for leave to file pet. for reh. denied*, 326 U.S. 807 (1945).

While the burden of establishing the existence of the relationship rests on the claimant of the privilege against

disclosure, *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), this Circuit, in the case entitled *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965) stated:

"We recognize that an attorney-client relationship arises when legal advice of *any kind* is sought from a professional legal adviser in his capacity as such. 8 Wigmore, Evidence (McNaughton Rev. 1961), §2292." [Emphasis supplied]

In *United States v. Kovel*, *id* at 921, this Circuit noted the accepted test "of Wigmore's famous formulation", the classic statement of attorney-client privilege as stated by Wigmore in VIII (3d Ed. 1940) §2292:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived . . ."

Accord: *Commercio E. Industria Continental, S.A. v. Dresser Industries*, 19 F.R.D. 513 (S.D.N.Y. 1956).

This Circuit, in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), in upholding as privileged, under the circumstances, communications to a non-lawyer (accountant) by the lawyer's client, observed with respect to such communications:

"That, as by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man * * * should have recourse to the assistance of professional lawyers, and * * * it is equally necessary * * * that he should be able to place unrestricted

and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret * * *," Jessel, M.R. in *Anderson v. Bank*, 2 Ch.D. 644, 649 (1876).'

By analogy to the overall reasoning in *Kovel*, it would seem that where a person communicates factual data to a lawyer for communication and discussion with another specialist-lawyer, that the privilege exists by virtue of the agency when coupled with the professional status of the recipient of the information. Again, in *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), pooled general information needed to apprise the parties of their status, even though exchanged in the presence of non-lawyer co-defendants and their counsel, did not diminish the privileged nature of the communications. See also, *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965).

Irving Stern, the asserted holder of the privilege not only sought to become a client, he *was* a client of attorney Bodenstein, the person to whom the communication was made. Bodenstein was a member of the bar and, in connection with this communication, was active as a lawyer. The communication related to financial data and surrounding facts of which attorney Bodenstein was informed by Stern, without the presence of strangers, for the purpose of securing primarily an opinion on tax law, legal services and assistance in an anticipated legal proceeding and definitely not for the purpose of committing a crime or tort, and the privilege was claimed and never waived by Stern. Statement of Facts, pp. 3-11; see Wigmore test even as expanded in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D.C. Mass. 1956).

It is urged that the factual evidence on appeal be viewed in the light most favorable to the appellee. *Glasser v. United States*, 315 U.S. 60, 80 (1943). Generally the gov-

ernment is the appellee but the principle espoused in *Glasser* is not based upon the identity of the parties but rather, on the concept that the appellee sustained his burden of proof at the trial level and thus enjoys the evidentiary advantage. While the quantum of proof required may be less with respect to the burden imposed at a hearing, *i.e.*, "preponderance of evidence" *vis a vis* "beyond a reasonable doubt", this should not detract from the traditional appellant view of factual determination made at the District Court level.

POINT II

The District Court held that the conversations were privileged, not just because of client-principal and attorney-agent communications, but because there was an attorney-client relationship.

Appellee's Statement of Facts, at pp. 11-13, analyzes the District Court's findings and ruling.

The government's second argument, that the District Court "erred in holding the conversation privileged *because* Bodenstein was acting as an intermediary between Stern and Mr. Bender," misstates or misconceives the District Court's holding which was that attorney Bodenstein was more than an intermediary and that Stern wouldn't have confided in him if Bodenstein were not qualified to make legal judgments. Appellant thus seeks to employ a straw-man created, not from the overall substance of the record, but from its rejected arguments as propounded to the District Court.

Appellant asserts that the trier of the facts erred in judgment in evaluating facts because it undertook consideration of the theory of an attorney-agent, client-principal relationship with respect to communications made to the attorney

for the purpose of conveying it to another attorney-specialist to secure specialist advice. In making the assertion appellant employs reasoning that seeks to compartmentalize the taped conversation rather than view it, as the District Court did, from an overall consideration including the hearing testimony as to the facts and circumstances preceding the tape-recording and the credibility of the claimant.

In seeking to discredit the Trial Court's view of the facts appellant presses its own contention that it was attorney Bodenstein who first proposed specialist-counsel. But the record reveals that Stern testified that it was he who sought such specialist assistance through attorney Bodenstein prior to the May 18, 1973 meeting, (HR. 227-232) and it was a version implicitly accepted by the Court as the fact-finder.

Appellant assumes that the client can be held to the same high degree of knowledgability of lawyer-client relationship proprieties that the lawyer might be expected to command. (Appellant's Brief at pp. 36-37). Then to confound the issues further, appellant makes assumptions of positive guilt based on facts still only alleged in untried indictments returned over a year after the events at issue took place, *i.e.* ". . . and Steinman, according to the indictment, was the individual who delivered thousands of dollars in bribe payments to Stern . . .", etc. The accusations then became "... facts known to Stern ...".¹³ The next step is equally "logical". Since Stern, says appellant, is presumed guilty and in full possession of all the guilty facts, and although never told by attorney Bodenstein that attorney Bender either would not or could not represent him, Stern should

¹³ Apparently appellant can not rid itself of the notion that it is the *appellee* and has secured a conviction from which it can assert that the facts must be viewed in a light most favorable to it. It might be laconically said that such is not the case.

have known that it wasn't proper for Bender to "represent" him.¹⁴

Thus, reasons appellant, no privilege attaches because Stern *knew* he couldn't be represented, citing *Smale v. United States*, 3 F.2d 101 (7th Cir. 1924) which dealt with a defendant's unsolicited remarks made to someone else's lawyer and which were exculpatory as to the latter's client, and the case of *Prichard v. United States*, 181 F.2d 326 (6th Cir. 1950) which dealt with conversations made by a lawyer-defendant to a circuit judge who was impaneling a grand jury charged with investigating the very fraud for which the defendant was ultimately indicted and convicted. Both cases are clearly distinguishable. In neither was there an attorney-client relationship *and the trial court so found*. In the instant case, from the weight of the evidence, the trial court found the relationship *did* exist. (HR. 310)

Then, as best as can be gleaned from the printed page, appellant argues that, assuming Stern's communications with attorney Bender to be privileged, the use of attorney Bodenstein to communicate with attorney Bender is unprotected by the privilege because Bodenstein, although an attorney, is really only a third party whose very presence destroys the privilege. In support of this, cases are cited by the government which are *not* supportive of its proposition that an attorney upon whom confidences are bestowed and from whom legal advice and assistance *is* secured is somehow denuded of his peculiar status as a lawyer if it is intended that he impart the information to a lawyer-specialist. To the contrary, an attorney is an attorney and the client is protected even though his problems are referred to the specialist.

¹⁴ Appellant never distinguishes between the client seeking *advice* and that the client seeking advice and, possibly, representation at some later proceedings should they arise.

Circumstances can dictate a variety of situations where the attorney-client privilege is preserved because of the practicalities of everyday life involving the utilization of even non-attorneys outside the presence of counsel, with counsel present, and the like. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). It is submitted that it may be fairly argued from *Kovel* that a confidential communication by a layman to a lawyer, made in the belief that it was confidential and for the purpose of obtaining advice from either that lawyer or another, specialist lawyer, is privileged communication. See also, *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965), sustaining, as privileged, conversations between defendants and their respective lawyers as essential from a practical point of view.

The District Court, the trier of the facts, based on the hearing testimony, the tape-recording, the transcript and its observations of human behavior stated, clearly:

"Therefore, I would hold . . . *the weight of the evidence* is that in this conversation Mr. Stern was speaking to Mr. Bodenstein *as an attorney . . .*"

" . . . it does seem to me clear that Mr. Bodenstein *was more than merely an intermediary*. The confidences would not have been given to him, it seems to me without the belief on the part of Mr. Stern that he was giving them to someone who could have the judgments that are associated with attorneys." (HR. 310-311) [Emphasis supplied]

Accordingly, it is plain that the District Court found that there was an attorney-client relationship between appellee and attorney Bodenstein and that the privilege applied.

POINT III

The evidence does not support appellant's claim that appellee sought professional assistance to perpetrate a fraud.

Appellant persists in asserting that the trier of the facts erred in judgment in evaluating facts because the Trial Court did not impute criminality to the tape-recorded hand-wringing, nerve-racked utterances of a distraught man who sought legal advice and assistance from a lawyer who pretended to give legal counsel and comfort while secretly intending to gather facts he might later use to curry favor with government prosecutors.

In attempting to prove the claimed illicit purpose of appellee Stern in seeking legal advice, appellant relies on three short paragraphs, excerpted from two separate pages, (TR. 5; TR. 10) which are but rhetorical questions not answered. To bolster what the recorded word doesn't support, appellant seeks to show what appellee's words meant by quoting the concept of appellee's intent as viewed by that masker of true intent, attorney Bodenstein! But the factfinder, the District Court, clearly discredited Bodenstein's theory. (Compare HR. 117-118 with HR. 266-267) Furthermore, as was apparent even to Bodenstein, appellee's utterances were admittedly the product of a mind that was highly upset, agitated, distraught by illness at home and even *irrational*, uncontradicted factors which, if it was really an issue, would negate criminal intent. Appellee, nevertheless, did *not* ask attorney Bodenstein for criminal advice nor did attorney Bodenstein ever give criminal advice. (HR. 69; HR. 116-117; HR. 119; Appellee's Statements of Facts, p. 5) Stern explained that these statements reflected his concern over his past use of bonds

that he had borrowed and used as collateral for loans used in financial transactions. He had explained this to attorney Bodenstein on the occasion previous to the May 18, 1973, tape-recorded conversation. (HR. 248-256)

The Trial Court, in essence, reflected on the possibility that the evidence indicated that "maybe" appellee was thinking of using fabrication. But the Trial Court chose not to take mere possible evil thoughts and convert it into concrete criminal acts. Furthermore, the Trial Court noted that there was no indication, let alone evidence, that appellee either solicited or got criminal advice. (HR. 264-265; HR. 290-297)

Most important, however, the trial judge found that appellant's claim of abuse of the privilege fell short in substantial respects. (HR. 297) In *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465 (1933), quoted, in part, by appellant at p. 40 of its brief, Mr. Justice Cardozo also goes on to state, *id.* at 16, 53 S.Ct. at 470:

"A privilege surviving until the relation is abused and vanishing *when abuse is shown to the satisfaction of the judge* has been found to be a workable technique for the protection of the confidences of client and attorney." [Emphasis supplied]

The trial judge in the instant case did not find the abuse of privilege alluded to by appellant at the hearing. *He found there was none.* On review, it is urged that his finding, as stated by Mr. Justice Cardozo, is the workable technique which protects attorney-client confidences.

CONCLUSION

For the reasons stated above the District Court's findings and ruling upholding appellee's claim of privileged communications must be sustained.

Respectfully submitted,

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Service of Tuc (2) copies of the within
Officer's Brief is hereby admitted
this 23rd day of December, 1974

.....
Attorney(s) for

